93-568

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ALLIED PRODUCTS CORPORATION,

Petitioner,

v.

RAYMOND RENKIEWICZ, personal representative of the estate of Eugene Renkiewicz, deceased, and JOSEPH and ETHEL L. NORTLEY, copersonal representatives of the estate of Mary Nortley Renkiewicz, deceased,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

THOMAS CAMPBELL
(Counsel of Record)
WILLIAM J. BARRETT
JAMES W. TEEVANS

GARDNER, CARTON & DOUGLAS
321 N. CLARK STREET, SUITE 3400
CHICAGO, ILLINOIS 60610
(312) 644-3000

Attorneys for Petitioner
Allied Products Corporation

October 11, 1993

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APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS OCTOBER 19, 1992

RENKIEWICZ v. ALLIED PRODUCTS CORPORATION

Docket No. 134931. Submitted July 22, 1992, at Grand Rapids. Decided October 19, 1992, at 9:15 A.M.

Raymond Renkiewicz, as personal representative of the estate of Eugene Renkiewicz, deceased, and Joseph and Ethel Nortley, as copersonal representatives of the estate of Mary Nortley Renkiewicz, brought a products liability action in the Charlevoix Circuit Court against Allied Products Corporation, White Farm Equipment Company, Inc., and others after the decedents died in an accident involving a farm tractor designed, manufactured, and sold by White Farm. Before the accident, White Farm had filed bankruptcy under Chapter 11 of the United States Bankruptcy Code and the bankruptcy court had confirmed a reorganization plan submitted by White Farm and its creditors under which Allied was to acquire the assets of White Farm free and clear of products liability claims. The circuit court, Richard M. Pajtas, J., granted summary disposition for Allied, ruling that the plaintiffs' claims under state law of liability by Allied as the successor of White Farm had been discharged in the bankruptcy proceeding upon confirmation of the reorganization plan. The plaintiffs appealed.

The Court of Appeals held:

State law governing successor liability is preempted by the Bankruptcy Code upon confirmation of a reorganization plan under 11 USC 1141(d) with respect

to claims accruing before confirmation. Liability claims that accrue after confirmation are not preempted by the Bankruptcy Code. The trial court erred in granting summary disposition for Allied.

Reversed and remanded for further proceedings.

PRODUCTS LIABILITY -- BANKRUPTCY -- SUCCESSOR LIABILITY.

The provision of Chapter 11 of the United States Bankruptcy Code that discharges a debtor from any debt that arose before the date of confirmation of a reorganization plan does not preempt state law governing successor liability in situations involving an unaccrued future claim; thus a business that, pursuant to a confirmed Chapter 11 reorganization plan of another business, acquires the assets of the other business free and clear of any claims for products liability may be liable under state law for a dangerous or defective product of the business it acquires where the products liability claim accrues after the bankruptcy court confirms the reorganization plan (11 USC 1141[d]).

Charfoos & Christensen, P.C. (by David R. Parker, Jared P. Buckley, and Scott Rooney), for the plaintiffs.

Harvey, Kruse, Westen & Milan, P.C. (by John A. Kruse, Ronald E. Westen, Phillis F. Snow, and Mark T. Rajt), for the defendant.

Before: NEFF, P.J., and GRIBBS and CAVANAGH, JJ.

GRIBBS, J. Plaintiffs Raymond Renkiewicz, personal representative of the estate of Eugene Renkiewicz, deceased, and Joseph and Ethel L. Nortley, copersonal representatives of the

estate of Mary Nortley Renkiewicz, deceased, appeal as of right an order granting summary disposition to defendant Allied Products Corporation in this products liability case. We reverse and remand for further proceedings.

In 1985, White Farm Equipment Company filed a Chapter 11 bankruptcy petition. As part of that proceeding, defendant Allied Products Corporation purchased substantially all of White Farm's assets, pursuant to an acquisition agreement executed on October 9, 1985. The acquisition agreement provided that defendant Allied would purchase reorganization assets valued at $63,194,000. Excluded assets included a cash account in the amount of $4,600,000, certain receivables in the amount of $6,129,000, certain inventory, and White Farm's interest in certain real estate. In exchange for the transfer of reorganization assets, defendant Allied agreed to issue and deliver to White Farm 340,000 shares of a new series of preferred stock. The liquidation value per share was $50. The agreement specifically provided that the reorganization assets were to be transferred to defendant Allied free and clear of all liens, claims, and encumbrances. On October 31, 1985, the bankruptcy court ruled that White Farm was authorized to immediately consummate the acquisition agreement with Allied.

On November 11, 1987, the bankruptcy court confirmed a plan of reorganization between the official committee of unsecured creditors of White Farm and Borg-Warner Acceptance Corporation. At this time, it appears that the bankruptcy proceeding is still pending.

On December 15, 1987, plaintiffs' decedents were driving a farm tractor along a road in Charlevoix County. The tractor slid off the road and rolled over on its side, killing plaintiffs' decedents. The tractor was designed, manufactured, and sold by White Farm.

In 1989, plaintiffs filed their complaint against Allied, White Farm, and Minneapolis-Moline, alleging products liability, breach of warranty, fraud and misrepresentation, and strict liability. Plaintiffs also filed a complaint against the Charlevoix County Board of Road Commissioners, alleging nuisance and negligence.

Plaintiffs specifically alleged that Allied was the successor corporation of White Farm, and that Allied was liable under Michigan law for any and all damages incurred as a result of the sale of products by White Farm.

Defendant Allied moved for summary disposition, claiming that no liability could be imposed on it for any products liability claim based upon a defect in a White Farm product because it acquired the assets of White Farm in bankruptcy by operation of the United States Bankruptcy Code, which preempts state successor liability law. The trial court granted Allied's motion.

On appeal, plaintiffs contend that the trial court erred when it granted Allied's motion for summary disposition because the Bankruptcy Code does not preempt state law governing successor liability where plaintiff's possessed an unaccrued future claim. We agree.

This is an issue of first impression in the State of Michigan.

The trial court dismissed plaintiffs' products liability claims against Allied because the acquisition agreement between White Farm and Allied, which was approved by the bankruptcy court, specifically provided that Allied was not liable for products liability claims. The trial court held that the bankruptcy court's approval of the agreement was supreme and superseded state tort law. The trial court also relied on the following public policy reasons to support its position:

> With respect to public policy, the bankruptcy court in this case found that White Farm was not going to make that -- it was basically a defunct company and that if it did not prove -- approve the proposed transaction between White Farm and Allied that it would be out of business. And if that were the case, then any past and future tort claimants would be without a remedy. And so the bankruptcy court having approved this contract that provided for no liability for future product liability claims seems to me would be preferable from a public policy standpoint notwithstanding that it may disallow a source of recovery from persons injured by the product involved.
>
> If a prospective purchaser can't go to a defunct company that's involved in bankruptcy proceedings and purchase the assets of that company without picking up the potential products liability on those assets, then there are at least many situations where it wouldn't occur and the bankruptcy would be a Chapter 7 state bankruptcy liquidation.
>
> So it seems to me that as a matter of public policy that the bankruptcy's action in this case would preempt Michigan law.

We will first address pertinent sections of the Bankruptcy Code. 11 USC 105 sets forth the power of the bankruptcy court. Section 105(a) states:

> The court may issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No

> provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Although the bankruptcy court's powers under § 105(a) have been interpreted as being broad, they are not limitless and do not allow the court to override specific mandates of other sections of the Bankruptcy Code. *Lerch v. Federal Land Bank, 94 Bankr 988 (ND Ill, 1989). In re Granger Garage, Inc, 921 F2d 74, 77 (CA 6, 1990)*, the United States Court of Appeals held that "[t]he bankruptcy court is a court of limited jurisdiction." At issue in this case is whether the bankruptcy court had the power to discharge plaintiffs' products liability claim when the court approved the acquisition agreement and confirmed the reorganization plan. 11 USC 101(5)(A) defines a claim as a

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

A broad definition of claim is central to the policy [illegible] start for Chapter 11 debtors and permits debtors to receive the broadest possible relief in bankruptcy court because [illegible] a claim can be discharged only by confirmation of the reorganization plan under § 1141(d). *In re Chateauguay Corp, 87 Bankr 779, 795 (SD NY, 1988)*, rev'd on other grounds *Pension Benefit Guaranty Corp v LTV Corp, 496 US 633, 110 S Ct 2668; 110 L Ed 2d 579, (1990); Johnson v. Home State Bank, 501 US ; 111 S Ct 2150; 115 L Ed 2d 66 (1991)*. Similarly, the term "debt" is to be given a broad and expansive reading. *In re Chase & Sanborn*

Corp, 904 F2d 588 (CA 11, 1990). Debt is defined as "liability on a claim." 11 USC 101(12).

11 USC 1141(d) provides that the confirmation of a reorganization plan discharges the debtor from any debt that arose before the date of confirmation. Section 1141 does not discuss whether debts that arose after the date of confirmation are discharged. The rationale behind discharging preconfirmation claims is that the Bankruptcy Code grants the good-faith debtor freedom from prepetition legal obligations and promises creditors in the confirmed plan of reorganization that a realistic possibility of payment exists. *In re Production Plating, Inc*, 90 Bankr 277, 284 (ED Mich. 1988). Creditors whose claims arise before confirmation will have an opportunity to take part in the reorganization plan and a chance to obtain some sort of remedy.

In the trial court, on its motion for summary disposition, Allied placed great emphasis on the case of *In re White Motor Credit Corp*, 75 Bankr 944 (ND Ohio, 1987) for the proposition that the Bankruptcy Code preempts state laws regarding successor liability. In that case, White Motor filed a voluntary petition under Chapter 11. During the reorganization proceedings, another company, Volvo, agreed to purchase substantially all of White Motor's remaining truck business assets. The court determined that the sale was appropriate and entered an order approving the purchase agreement. The purchase agreement provided that Volvo would not assume any liabilities of White Motors for personal injuries or property damage because of alleged negligence, breach of warranty, or products liability. Despite the provision, lawsuits were filed against Volvo for successor liability resulting from its purchase of the White Motor truck assets. The tort claims arose before plan confirmation and were within the scope of the debtor's discharge. Thus, at issue was "whether state successor liability law [was] preempted by federal law to the extent the claims underlying the successor's liability have been discharged under a plan of reorganization." White Motor, *supra* at 950. The bankruptcy

court held that federal bankruptcy law preempts state laws imposing successor liability, and stated:

> The liability which state law imposes through successor liability is that of the manufacturer. The federal purpose of final resolution and discharge of corporate debt is clearly compromised by imposing successor liability on purchasers of assets when the underlying liability has been discharged under a plan of reorganization. Moreover, successor liability is precluded by Section 1141(c) which specifically frees debtor's property from creditors' claims.
>
> Successor liability in these circumstances has, therefore, been pre-empted by the Bankruptcy Code.
>
> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy code. [Id. at 950-951. Emphasis added.]

The present case is clearly distinguishable from *White Motor*. Here, plaintiffs' claims arose after White Farm filed the petition in bankruptcy and after the bankruptcy court confirmed the reorganization plan. In *White Motor*, on the other hand, the decision dealt specifically with claims that arose before plan confirmation. The distinction is important because under 11 USC

1141(d) only debts that arise before the date of the confirmation of the reorganization plan may be discharged. The *White Motor* court expressly limited its decision to claims that arise before confirmation and are consequently "discharged under a plan of reorganization." Id. at 950. In this case, the record clearly indicates that plaintiffs did not have a claim at the time the reorganization plan was confirmed because their claims did not arise until December 15, 1987, the date of the decedents' fatal accident. In Michigan, a products liability claim does not accrue until an injury occurs. *Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich 146; 200 NW2d 70 (1972); *Larson v. Johns-Manville Sales Corp.*, 427 Mich 301; 399 NW2d 1 (1986). The reorganization plan was confirmed on November 5, 1987, approximately one month before the accident occurred. In accordance with § 1141(d) of the Bankruptcy Code, plaintiffs' claims did not arise before the date of the confirmation, and therefore were not dischargeable by the bankruptcy court.

We find *In re Mooney Aircraft, Inc.*, 730 F.2d 367 (CA 5, 1984), persuasive because it addressed claims that arose after the sale of assets and after the bankruptcy estate was closed. In that case, Mooney Aircraft, Inc., and Mooney Corporation, Inc. (Mooney-Texas), filed applications for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code. On March 14, 1969, American Electronics Laboratories, Inc., purchased all the business assets of Mooney-Texas free and clear of all claims, liabilities, liens, encumbrances, mortgages, and security interests. Subsequently, the assets were sold to the plaintiff, Mooney Aircraft Corporation (Mooney-New Jersey). The bankruptcy estate was closed on March 13, 1972. On November 24, 1973, the defendants' decedents were killed when the aircraft they were flying lost a wing in flight and crashed. The aircraft was manufactured by Mooney-Texas. In November 1974, the defendants filed wrongful death actions against Mooney-New Jersey. On November 7, 1990, Mooney-New Jersey filed an application in bankruptcy court to reopen the estate of Mooney-Texas and a complaint to enjoin the state court proceedings. The

bankruptcy court entered an order permanently enjoining the defendants from pursuing their claims. The district court reversed and Mooney-New Jersey appealed. On appeal, the United States Court of Appeals found that the defendants' claims did not arise until more than five years after the sale and more than a year after the bankruptcy estate was closed. The court held that "[t]he bankruptcy court could not sell free and clear of claims asserted by the victims of an accident which did not occur until five years later." The court concluded that the bankruptcy court lacked jurisdiction over Mooney-New Jersey's complaint. 730 F.2d 375.

Although *Mooney* does not address Chapter 11, the facts in *Mooney* are similar to the facts in this case. Here, the trial court held that the bankruptcy court had jurisdiction over plaintiffs' claims and that plaintiffs' claims were discharged when the bankruptcy court approved the acquisition agreement that provided that the reorganization assets would be transferred to defendant Allied free and clear of all liens, claims, and encumbrances. The trial court failed to take notice of the fact that plaintiffs' claims did not arise until after the confirmation of the acquisition agreement and the plan of reorganization. The *Mooney* Court specifically stated that the bankruptcy court could not sell free and clear of claims asserted by victims of an accident that did not occur until after the confirmation of the sale. In accordance with *Mooney*, the bankruptcy court in the present case did not have jurisdiction to discharge plaintiffs' claims under the acquisition agreement because plaintiffs' claims did not arise until more than a month after the confirmation of the sale of assets and approximately two years after the authorization of the sale of assets.

Because the reorganization plan was confirmed before the time plaintiffs' claims arose, we find plaintiffs' claims cannot be discharged by the bankruptcy court under § 1141(d). As a result, the trial court erred when it granted defendants' motion for summary disposition, holding that the bankruptcy court's ruling

preempted state law governing successor liability in situations involving an unaccrued future claim.

The question we must now answer is whether a record might be developed upon which reasonable minds could differ regarding the existence of successor liability. However, when the trial court granted defendants' motion for summary disposition on the ground that the Bankruptcy Code was supreme and superseded state tort law, it held that there was no need to address whether a continuity of enterprise existed between White Farm and defendant Allied under the theory of successor liability. Because we find that the trial court erred in granting Allied's motion for summary disposition, we reverse and remand to the trial court for further proceedings.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

APPENDIX B

ORDER DENYING REHEARING
JANUARY 4, 1993

Court of Appeals, State of Michigan

ORDER

Janet T. Neff
Presiding Judge

Raymond Renkiewicz v. White Farm Equipment Co.

Docket # 134931

L.C. # 89-039113-NO

Roman S. Gribbs
Mark J. Cavanagh

_____ Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on

January 4, 1993 /s/
Ella Williams, Chief Clerk

APPENDIX C

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL JULY 13, 1993

ORDER
Entered: July 13, 1993

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice
Charles L. Levin
James H. Brickley
Patricia Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate/Justices

95740

RAYMOND RENKIEWICZ, Personal Representative of the Estate of EUGENE RENKIEWICZ, Deceased and JOSEPH and ETHEL L. NORTLEY, Co-Personal Representative of the Estate of MARY NORTLEY RENKIEWICZ, Deceased,

Plaintiffs-Appellees,

v.

ALLIED PRODUCTS CORPORATION, a foreign corporation,

SC: 95740
COA: 134931
LC: 89-039113-NO

Defendant-Appellant.

and

WHITE FARM EQUIPMENT COMPANY INC., formerly known as MINNEAPOLIS-MOLINE, a foreign corporation, and BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF CHARLEVOIX, a municipal corporation, jointly and severally,

Defendants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals.

Boyle, J., would grant leave to appeal.

80708

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

July 13, 1993 /s/

Clerk

APPENDIX D

ORDER OF SUMMARY DISPOSITION BY JUDGE PAJTAS, OCTOBER 25, 1990

ORDER OF SUMMARY DISPOSITION

At a session of said Court held in the County Courthouse in the City of Charlevoix, State of Michigan, on October 8, 1990

PRESENT: HONORABLE: Richard M. Pajtas
CIRCUIT COURT JUDGE

THIS MATTER having come before the Court on the Motion of Defendant Allied Products Corporation and the Court having read the briefs of counsel and having heard the argument of counsel in open Court and being otherwise fully advised in the premises;

IT IS ORDERED, for the reasons stated on the record, this Court finds that the matter is preempted by federal law and therefore grants summary disposition to Defendant Allied Products Corporation.

IT IS FURTHER ORDERED, that there being no just reason for delay, this is a final Order as to Defendant Allied Products Corporation.

/s/
DATE: 10/25/90 Hon. Richard M. Pajtas
CIRCUIT COURT JUDGE

APPENDIX E

EXCERPT OF PROCEEDINGS BEFORE JUDGE PAJTAS, OCTOBER 8, 1990

STATE OF MICHIGAN

33rd CIRCUIT COURT IN
THE COUNTY OF CHARLEVOIX

RAYMOND RENKIEWICZ,

Plaintiff,

v File No. 89-391-13 NO

WHITE FARM EQUIPMENT
CO., INC.,

Defendant.
_____/

EXCERPT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD M. PAJTAS, CIRCUIT JUDGE
Charlevoix, Michigan - Monday, October 8, 1990

APPEARANCES:

For the Plaintiff: MR. SCOTT T. BEATTY (P24202)
Attorney at Law
101 West Hurlbut
Charlevoix, Michigan 49720
(616) 547-4059

For the Defendant: MR. RONALD E. WESTEN (P22208)
Attorney at Law
1590 First National Building
Detroit, Michigan 48226
(313) 964-3100

Reported by: Lugene D. York, CSR-CER 2892, RPR
Official Court Reporter

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WITNESSES Page

None

EXHIBITS

None

Charlevoix, Michigan
Monday, October 8, 1990
(Except of proceedings.)

THE COURT: I would like to rule on this one.

There was a lengthy agreement, I forget if it was 50 or 100 pages long but it did contain a provision that the Allied Products purchaser was not liable for future product liability claims. The bankruptcy court, which issued a lengthy opinion, approved the contract between White Farm and Allied. The issue, which is narrow, is whether or not that ruling by the Federal Bankruptcy Court preempts and/or supercedes Michigan Products Liability law. And the authority that is available, albeit scant, seems to support the Defendant Allied's position in this case that the ruling that the bankruptcy court is supreme and it supercedes state tort law so that in this particular situation we don't need to get into the Turner and Pelk issues. There's no Michigan case law on point.

With respect to public policy, the bankruptcy court in this case found that White Farm was not going to make that -- it was basically a defunct company and that if it did not prove -- approve the proposed transaction between White Farm and Allied that it would be out of business. And if that were the case, then any past and future tort claimants would be without a remedy. And so the bankruptcy court having approved this contract that provided for no liability for future product liability claims seems to me would be preferable from a public policy standpoint notwithstanding that it may disallow a source of recovery from persons injured by the product involved.

If a perspective purchaser can't go to a defunc company that's involved in bankruptcy proceedings and purchase the assets of that company without picking up the potential products liability on those assets, then there are at least many situations where it wouldn't occur and the bankruptcy would be a Chapter 7 state bankruptcy liquidation.

So it seems to me that as a matter of public policy that the bankruptcy's action in this case would preempt Michigan law.

Other than to rely upon that limited idea of public policy and the limited authority that is available, there's not much basis here to rule in favor of the plaintiff's position. I should say there is no basis here other than the opposite public policy that the plaintiff makes to provide a source of recovery.

So until there is further definitive guidance from the Michigan appellate courts it's my opinion, as it has been the opinion of other trial courts and including the opinion of the Oakland County trial court, that bankruptcy law preempts and the motion for summary disposition should be granted on that basis. So ordered.

MR. WESTEN: And, Your Honor, do you want to enter your order or do you want the order presented to the court? We will be glad to present one, I just wanted to know. Some courts now have -- they enter it on a computer sometimes in Wayne County. But I'll gladly prepare one.

THE COURT: Oh, I see. No. No, I don't have that capability.

MR. WESTEN: Okay.

THE COURT: You should present an order either approved as to form or submit it under the seven day rule.

MR. WESTEN: Thank you.

THE COURT: Thank you very much for your arguments, gentlemen.
(Proceedings concluded.)

STATE OF MICHIGAN)
)
COUNTY OF CHARLEVOIX)

I certify that this transcript, consisting of 5 pages, is a complete, true, and correct transcript of the proceedings taken in this case on October 8, 1990.

November 19, 1990 /s/

Lugene D. York, CSR-CER 2892, RPR
Official Court Reporter
33rd Circuit Court
County Building
Petoskey, Michigan 49770

APPENDIX F

ORDER AUTHORIZING SALE OF ASSETS BY UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, OCTOBER 31, 1985

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
WHITE FARM	)	
EQUIPMENT COMPANY,	)	NO. 85 B 7532
a Delaware corporation,	)	
	)	
Debtor.	)	

ORDER AUTHORIZING SALE OF ASSETS

I. INTRODUCTION

On September 19, 1985 White Farm Equipment Company ("WFE"), debtor in possession in this chapter 11 proceeding, filed its motion pursuant to 11 U.S.C. §§363(b) and 363(f) ("the WFE Sale Motion") requesting authorization to consummate a proposed acquisition transaction with Allied Products Corporation ("Allied") whereby Allied is to acquire substantially all of WFE's assets, free and clear of liens, claims and encumbrances in accordance with a certain Letter of Intent dated September 11, 1985 and pursuant to specific terms and provisions more fully set forth in a certain "Agreement for Acquisition of Assets of White Farm Equipment Company in Exchange for Preferred Stock of Allied Products Corporation"

("Allied Acquisition Agreement") dated October 9, 1985. In accordance with this court's Order dated September 23, 1985 a notice of the hearing to be conducted upon the WFE Sale Motion was duly transmitted by the Clerk of the United States Bankruptcy Court for the Northern District of Illinois, Eastern division to all creditors and other parties in interest pursuant to Bankruptcy Rules 2002(a) and 6004(a) ("Sale Notice"). The court's September 23, 1985 Order and the Sale Notice fixed October 18, 1985 as the last day for parties in interest to file either objections to the WFE Sale Motion or an appropriate pleading asserting a lien, claim, encumbrance or other alleged property right (i.e., ownership) in the Reorganization Assets (as that term is defined in the Allied Acquisition Agreement). Certain objections and lien claims were timely filed in accordance with this court's September 23, 1985 Order and the Sale Notice, including objections by the Official Creditors' Committee ("Committee"), John T. Grigsby ("Grigsby") the Committee Chairman, the Pension Benefit Guaranty Corporation ("PBGC") and certain former WFE dealers ("Former Dealers"). Both the Former Dealers, and other existing WFE dealers, have timely filed pleadings alleging, inter alia, ownership of certain Reorganization Assets or their proceeds. WFE disputes those allegations. The court has completed a hearing upon the WFE Sale Motion, and objections thereto, during which hearing the court heard and received both oral and documentary evidence submitted by WFE in support of its motion. The court has considered the testimony of Robert Terry, the Senior Vice President of WFE and its Chief Operating Officer; Charles Lunger, an officer of Allied; James Cerone, a certified financial analyst with the firm of Duff & Phelps, Inc. and Sidney Kriser, President of Industrial Plants Corporation ("IPC"). Robert Terry testified as to, inter alia, the financial condition of WFE, its prospects for reorganization, the likely consequences if WFE fails to consummate the Allied Acquisition Agreement, the benefits which will accrue to WFE, its creditors and other parties in interest if WFE is authorized to implement the Allied Acquisition

Agreement and the prior marketing efforts made by WFE and others to sell WFE or obtain a merger partner. Charles Lunger testified as to, inter alia, the existing market conditions, marketing and production schedules which mandate the immediate consummation of the transaction. James Cerone testified as to, inter alia, the value of the Allied Preferred Stock. Sidney Kriser testified as to, inter alia, the liquidation value of certain WFE assets and IPC's prior auction efforts relating to the assets and certain business units of WFE. All exhibits tendered by WFE were received into evidence. Duplicate copies of each of WFE's exhibits have been filed with the court. All parties were afforded an adequate opportunity for cross-examination of WFE's witnesses. No party other than WFE tendered evidence to the court for its consideration. Having heard the testimony, and having reviewed the exhibits, and having taken judicial notice of certain matters of record in this chapter 11 proceeding, and having reviewed the WFE Sale Motion and the extensive memorandum of WFE filed in support thereof, as a reply to sale objections, the court makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

A. On May 22, 1985 an involuntary petition under chapter 7 of the Bankruptcy Code was filed against WFE in the United States Bankruptcy Court for the District of Kansas.

B. On June 5, 1985 an Order was entered by the Kansas bankruptcy court transferring venue of this bankruptcy case to this judicial district.

C. On June 24, 1985 WFE converted its bankruptcy case to a proceeding under chapter 11 of the Bankruptcy Code and thereupon became debtor in possession.

D. Robert Terry, WFE's Senior Vice President and Chief Operating Officer, has been designated by this court as

WFE's Responsible Officer in accordance with Bankruptcy Rule 9001(5).

E. At the time WFE's bankruptcy proceeding was initiated WFE was engaged in various business enterprises including the manufacture of forklift trucks in a facility located in Hopkins, Minnesota; the manufacture of farm implements, tractors and related products in facilities located in South Bend, Indiana and Charles City, Iowa; and the operation of a foundry in Charles City, Iowa.

F. WFE sells and distributes its products through a network of independently owned dealers located throughout the United States and Canada.

G. Prior to the initiation of WFE's bankruptcy proceeding Borg-Warner Acceptance Corporation ("BWAC") had given notice of its intent to foreclose its security interests, liens and mortgages, upon WFE's assets and had scheduled a sale of the personal property of WFE pursuant to the provisions of the Uniform Commercial Code, as in effect under applicable state law.

H. BWAC has asserted a claim against WFE (and its property) in an amount in excess of $140 million.

I. BWAC further asserts that its claim is secured by a first and prior lien upon all assets of WFE's estate and has filed a claim to that effect in these proceedings.

J. Due to the initiation of WFE's bankruptcy case, and the imposition of the automatic stay occasioned by 11 U.S.C. §362(a), the prepetition foreclosure sale noticed by BWAC was not held.

K. On June 25, 1985, after notice and hearing, this court authorized WFE to engage IPC to conduct an auction sale of all of the assets of WFE's estate on July 24, 1985.

L. Adequate notice of the July 24, 1985 auction sale was provided to all creditors, potential bidders and other parties in interest.

M. Other than a $2 million bid made by Consolidated Stores, Inc. for WFE's lift truck division located in Hopkins, Minnesota, no acceptable bids were received for any of WFE's business units or assets.

N. After July 24, 1985 WFE continued to operate its business as debtor in possession on a limited basis. At present, WFE is not manufacturing tractors or farm implements and has not manufactured these products since January of 1985.

O. WFE's business operations have been limited, since February of 1985, to the sale and distribution of replacement parts and the production of original equipment component parts for third parties at WFE's Charles City, Iowa foundry.

P. Upon the conclusion of the initial sale proceeding WFE commenced negotiations with Allied for the sale of WFE's business and substantially all of its assets. As WFE's designated Responsible Officer, Robert Terry participated in those arms-length negations with Allied and BWAC over a period of several months.

Q. On September 11, 1985 Allied delivered a Letter of Intent to WFE wherein Allied proposed to purchase substantially all of WFE's assets, excluding cash of $5 million (since reduced to $4.6 million), certain receivables, certain finished products and WFE's interest in certain real estate located

in South Bend, Indiana, free and clear of all liens, claims and encumbrances in exchange for Allied preferred stock having a face value of $17 million to be issued specifically in connection with the WFE acquisition. In addition, WFE's claims and causes of action arising under 11 U.S.C. §§510, 544, 547, 548 and 549 were to be excluded from acquisition by Allied.

R. On September 19, 1985 the WFE Sale Motion was filed. Shortly thereafter, this court entered the aforementioned September 23, 1985 Order and caused the Sale Notice to be transmitted to creditors and other parties in interest in accordance with Bankruptcy Rules 2002(a) and 6004(a).

S. On October 9, 1985 WFE entered into the Allied Acquisition Agreement, subject to its approval by this court.

T. On October 10, 1985 an Order was entered by this court authorizing WFE to consummate the first step of the Allied acquisition transaction, i.e., the sale of WFE's farm implement production business and certain assets pertaining thereto, located in South Bend, Indiana (previously identified in the October 10, 1985 Order as the "South Bend Assets").

U. The value of WFE's remaining business, and therefore its assets, is rapidly deteriorating. For the past several years, WFE has suffered operating losses. It is likely that such losses shall continue unabated.

V. WFE has lost a substantial number of its dealers due to the uncertainty of WFE's continued ability to manufacture inventory.

W. WFE has lost a number of key employees due to the uncertainty of its continued viability.

X. WFE does not have sufficient capital to commence or sustain full operation of its remaining business enterprises.

Y. WFE does not have sufficient capital, nor is there any reasonable likelihood of WFE obtaining sufficient capital, to propose and consummate a chapter 11 plan, absent a sale of its business and assets to a third party.

Z. WFE has not received any bona fide offers for the sale of its business or its assets which are worthy of consideration, other than the Allied offer.

AA. The nature of WFE's primary business, the manufacture and sale of tractors and farm implements, and the market conditions imposed by virtue of that business, requires the immediate consummation of the Allied transaction in order to provide Allied with sufficient lead time to commence new manufacturing and product distribution for the spring selling season.

BB. WFE's remaining dealers do not have a sufficient inventory of tractors or farm implements to offer for sale to consumers. Consequently, WFE is in danger of losing its entire dealer network and customer base.

CC. Consummation of the Allied transaction will result in the maintenance of WFE's dealer network and customer base.

DD. Consummation of the Allied transaction will result in the continuation of WFE's businesses as well as a preservation of WFE's existing labor force.

EE. Consummation of the Allied transaction will result in the elimination of significant liabilities of WFE's estate.

including claims relating to certain product warranties, employee benefits and certain contractual obligations.

FF. Consummation of the proposed transaction will result in the preservation of the value of WFE's existing inventory in the hands of its dealers and consumers.

GG. The value of the Allied preferred stock to be transferred to WFE's estate is, according to the expert testimony of James Cerone, approximately $15 million. Accordingly, the sale consideration appears to be adequate in the circumstances.

HH. Failure to approve the Allied transaction shall result in WFE, and its creditors, losing a lucrative business opportunity.

II. Failure to approve the Allied transaction would result in WFE filing a motion to convert this case to a chapter 7 liquidation proceeding.

JJ. The sale assets have previously been exhaustively exposed to the market place resulting in no acceptable offers, other than the Allied proposal.

KK. No party in interest has either recommended, or evidenced an ability to implement, any alternative to the Allied transaction, other than the forced liquidation of WFE's assets.

LL. Forced liquidation of WFE's assets and the termination of its business operations shall have a negative economic and social effect upon WFE's employees, WFE's existing dealers and the municipality of Charles City, Iowa.

MM. The net liquidation value of the Reorganization Assets (as defined in the Allied Acquisition Agreement) is substantially less than the value of the Allied preferred stock.

NN. The Committee, among others, desires to preserve the issue of the enforceability of BWAC's lien claim.

III. CONCLUSIONS OF LAW

A. This matter is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(M).

B. This court has jurisdiction to authorize consummation of the Allied acquisition transaction pursuant to 28 U.S.C. §§1334(a), 1334(d) and 157(a).

C. This court has specific statutory authority to authorize consummation of the Allied acquisition transaction pursuant to 11 U.S.C. §§105(a), 363(b) and 363(f).

D. Notice of the hearing to be conducted in connection with the WFE sale motion was adequate in the circumstances and consistent with 11 U.S.C. §§102(1) and 363(b) and Bankruptcy Rules 2002(a) and 6004(a).

E. WFE's Sale Motion and the Allied Acquisition Agreement do not constitute a sub rosa chapter 11 plan in that they: (1) do not propose to impair or restructure existing debt or equity interests; (2) do not propose to impair or circumvent creditors' voting rights under a future chapter 11 plan; (3) do not propose to circumvent chapter 11 safeguards such as disclosure requirements; (4) do not propose to have approved an election to assume or reject executory contracts; (5) do not propose to classify claims, cure defaults, extend debt maturities or compromise controversies.

F. The sale price is adequate in the circumstances.

G. Allied is a good faith purchaser within the meaning of 11 U.S.C. §363(m).

H. Sufficient compelling business reasons exist in the particular circumstances of this case to grant the relief requested by the WFE Sale Motion.

I. It is not necessary for this court to reach and decide all of the arguments raised by WFE in its October 25, 1985 Reply to the PBGC's Objection to Sale. This court has concluded that the PBGC's primary argument, that the contractual provision set forth in Paragraph 4.5 of the prior PBGC settlement agreement entered into with, inter alia, WFE and BWAC, does not create an enforceable "restriction on transfer", akin to a property right. The holding of In re McKeague, slip op. (Bankr. D. Haw. 1982) cited by the PBGC to support its argument, is inapposite to the case at bar. The court further concludes that the provisions of the prior PBGC settlement agreement do not supercede this court's authority existing under, and by virtue of, the Bankruptcy Code to approve an appropriate disposition of WFE's assets.

J. The interests, if any, of all unsecured creditors in the sale proceeds, and other assets of this estate shall be adequately protected by virtue of the provisions of the Addendum to this order concerning the disposition of the sale proceeds and other assets of this estate.

K. All parties that have asserted a lien, claim, encumbrance or other property interest, such as ownership, in the Reorganization Assets on or before October 18, 1985 as provided in the Notice of September 19, 1985, are entitled to adequate protection of the value of their respective asserted claims of lien or ownership. Therefore, the net excluded cash, 4.6 million, shall be segregated in a separate interest bearing account and no portion thereof may be disbursed except upon other and further order of this court after hearing upon notice appropriate in the circumstances. All asserted claims of lien, encumbrance or other property right, including ownership, shall attach to and be paid

other and further order of this court after hearing upon notice appropriate in the circumstances. All asserted claims of lien, encumbrance or other property right, including ownership, shall attach to and be paid from the segregated funds to the same extent, and in the same priority, that such claims of lien, encumbrance or other property interest, including ownership, were legally valid and enforceable against the Reorganization Assets. Alleged claims of lien or ownership, other than BWAC's alleged lien claim, aggregate less than $4.6 million. Therefore, the court concludes that no parties' respective alleged property interest (lien or ownership) shall be (or shall be deemed to be) impaired, prejudiced or otherwise affected by virtue of the terms and provisions of this Order or any of the relief granted thereby.

L. Approval of the Allied acquisition transaction in the best interests of WFE, its creditors and other parties in interest.

M. All requests for extensions of time by parties in interest should be denied for the reason that such parties have been afforded an adequate opportunity in the circumstances to file and prosecute their respective objections to the relief requested by the WFE Sale Motion.

N. All objections to the relief requested in the WFE Sale Motion, to the extent they have not been withdrawn, should be overruled and denied for the reasons set forth above.

O. It is necessary and appropriate for this court to retain jurisdiction to, inter alia, interpret and enforce the terms and provisions of this Order (and the Addendum hereto) and to adjudicate, if necessary, any and all disputes concerning rights, title, alleged property interests, including ownership claims, relating to the Reorganization Assets as well as the extent,

validity and priority of all lien claims and other alleged property rights relating to the Reorganization Assets.

IV. DECRETAL PROVISIONS

Based upon the foregoing Findings of Fact and Conclusions of Law it is,

ORDERED, ADJUDGED AND DECREED:

1. WFE is herewith authorized to enter into, and immediately consummate the Allied Acquisition Agreement, as amended by the First Amendment to the Allied Acquisition Agreement, a copy of which First Amendment is annexed hereto as Exhibit A.

2. WFE is herewith authorized to immediately execute and deliver all documents reasonably necessary to implement the Allied Acquisition Agreement.

3. All objections to the WFE Sale Motion; and the relief requested therein, are denied.

4. All requests for an extension of time within which parties in interest may file and prosecute objections to the WFE Sale Motion, and the relief requested therein, are denied.

5. Except as otherwise provided in the Allied Acquisition Agreement the Reorganization Assets shall immediately be transferred to Allied free and clear of all liens, claims and encumbrances.

6. The Addendum to this Order is approved and incorporated herein by this reference.

7. This court retains jurisdiction (1) to interpret and enforce the terms of this Order and the terms of the Allied Acquisition Agreement; (2) to adjudicate all issues concerning liens, claims, encumbrances and alleged ownership interests with respect to the Reorganization Assets, including the extent, validity, enforceability and priority of all such liens, claims, encumbrances and alleged ownership interests. Such alleged ownership interests to include, but not be limited to, the claims of Former Dealers to superior rights in proceeds of the sale of the Reorganization Assets by reason of ownership of a part of such assets (inventory) or by reason of an express, implied or constructive trust imposed upon a part of such assets or upon the proceeds thereof; (3) to adjudicate all issues concerning WFE's right, title or interest in the Reorganization Assets and the sale proceeds; (4) to adjudicate all remaining issues concerning WFE's right to transfer title to the Reorganization Assets; (5) to condition, approve or disapprove any election made by WFE concerning WFE's election to assume or reject any unexpired lease or other executory contract pursuant to 11 U.S.C. §365, as a necessary incident to implementation of the Allied Acquisition Agreement.

8. The Excluded Cash Segregated Fund (as that term is defined in the Allied Acquisition Agreement) shall be deposited in a segregated interest bearing impressed account, in the name of WFE in its fiduciary capacity, and no part thereof shall be disbursed without other and further order of this court after notice and hearing appropriate in the circumstances. All liens, claims, encumbrances or alleged ownership interests asserted on or before October 18, 1985, shall attach to the aforesaid Excluded Cash Segregated Fund to the same extent, and in the same priority that such liens, claims, encumbrances or alleged ownership interests are held to be valid and enforceable against the Reorganization Assets by an appropriate order of this court. The Excluded Cash Segregated Funds shall be used to, inter alia, satisfy (disburse funds equal to the adjudicated value

of such property interests) to the extent such liens, claims, encumbrances or alleged ownership interests are held to be valid, enforceable, superior and paramount to both the asserted BWAC lien interests and the interests of WFE as debtor in possession under, e.g., 11 U.S.C. §544, by the aforesaid appropriate court order, provided however, WFE reserves its right to return the exact (if identifiable), or equivalent, inventory to the Former Dealers, or other persons asserting ownership interests in the Reorganization Assets.

9. A continued status hearing concerning trial procedures and briefing schedules relating to claims of lien and ownership shall be conducted on November 14, 1985 at nine-thirty in the morning, or as soon thereafter as counsel may be heard in this court.

ENTER FOR THE COURT:

Dated: 10/31/85 BY: /s/
Honorable John B. Schwartz,
Bankruptcy Judge